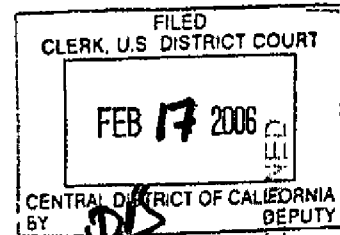


**EXHIBIT F**



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UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA

KAREN LOWMAN, et al.,

Plaintiffs,

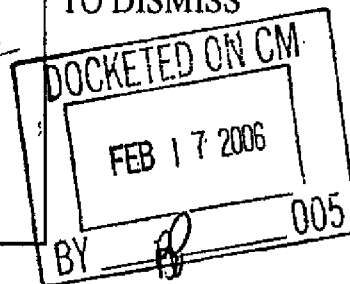
v.

MBNA AMERICA BANK, N.A.,

Defendant.

Case No. CV 05-7501 ER

ORDER GRANTING IN PART AND  
 DENYING IN PART MBNA'S MOTION  
 TO DISMISS



Defendant, MBNA Bank of America Bank, N.A. ("MBNA"), has filed a motion to dismiss Plaintiffs' second, third, fourth, fifth, and eighth causes of action of the First Amended Complaint. A hearing was held on the motion on Monday, February 6, 2005. In a Rule 12(b)(6) motion, the Court must decide whether the facts alleged in the complaint, if true, would entitle Plaintiffs to some form of relief; unless the answer is unequivocally "No," the motion must be denied. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In reviewing a Rule 12(b)(6) motion, the Court must accept as true the material allegations in the complaint and reasonable inferences from the alleged facts. Pareto v. FDIC, 139

1 F.3d 696, 699 (9th Cir. 1998).

2 In addition to monetary damages, Plaintiffs' second, third, and fourth causes  
3 of action seek declaratory relief, severance, and injunctive relief from provisions  
4 governing default interest rates and overlimit charges contained in the MBNA  
5 Cardmember Agreements alleging that the provisions are unconscionable, an  
6 illegal penalty, and in violation of federal law. Under § 85 of the National Bank  
7 Act, a determination of the legality of a national bank's provisions relating to the  
8 interest rates<sup>1</sup> it charges its borrowers is governed solely by its home state's  
9 banking laws.<sup>2</sup> Delaware law provides no relief for allegedly unconscionable  
10 interest rates that are specifically authorized by the Delaware Banking Act. See  
11 Del. Code Ann. tit. 5, § 944 (2005). Because Delaware law permits banks to  
12 collect whatever late payment and overlimit charges it desires within the law, the  
13 unconscionability doctrine cannot be read to impose "reasonability" limits in  
14 addition thereto. See Evans v. Chase Manhattan Bank USA, N.A., 2006 WL  
15 213740. \*3-4 (N.D. Cal. Jan. 27, 2006) (holding similar terms in Chase Manhattan  
16 Cardmember Agreements cannot be unconscionable as a matter of law stating  
17 "[w]here, as here, Delaware law not only speaks directly to the issue, but  
18 specifically authorizes the custom, the Court will not declare the terms  
19 unconscionable"); c.f. Buettner v. R.W. Martin & Sons, 47 F.3d 116, 119-20 (4th

20  
21 <sup>1</sup> The term "interest" includes late payments and overlimit fees. Smiley v. Citibank  
22 (South Dakota) N.A., 517 U.S. 735, 740 (1996) ("The term 'interest' as used in 12 U.S.C.  
23 § 85 includes any payment compensating a creditor for an extension of credit, making  
24 available a line of credit, or any default or breach by a borrower of a condition upon  
25 which credit was extended. It includes, among other things, the following fees connected  
with credit extension of availability: numerical periodic fees, late fees, . . . [and] overlimit  
fees . . .").

26 <sup>2</sup> Section 85 of the National Banking Acts provides that a national bank may  
27 charge its borrowers "interest at the rate allowed by the law of the State . . . where the  
28 bank is located." 12 U.S.C. § 85.

1 Cir. 1995) (reasoning "adoption of [plaintiff's] unconscionability arguments  
2 would create via unconscionability doctrine the very independent warranty to third  
3 party users that we have concluded . . . does not exist under Virginia law").  
4 Plaintiffs' allegations that MBNA's terms are unconscionable is a challenge to the  
5 law itself, and Plaintiffs have not alleged that the law is unconstitutional or  
6 otherwise infirm.

7 Furthermore, "a variable interest provision in the event of a stated default,"  
8 like the one at issue here, "is not a penalty," and therefore cannot be an "illegal  
9 penalty." See Ruskin v. Griffiths, 269 F.2d 827, 832 (2d Cir. 1959) (ruling that a  
10 default interest rate provision in a financial note is not a penalty but simply a  
11 reflection of the heightened risk of repayment that the creditor bears on the entry  
12 of default).

13 In addition to allegations of unconscionability and illegal penalty, the  
14 second and third causes of action allege that MBNA's failure to give notice of any  
15 change in interest rates is contrary to § 226.9 of the Truth In Lending Act  
16 ("TILA").<sup>3</sup> Although MBNA appears to have moved to dismiss the second and  
17 third causes of action in their entirety, it made no argument as to the alleged TILA  
18 violations.

19 Plaintiffs' fifth cause of action, alleging consumer fraud, fails to state a  
20  
21  
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23 <sup>3</sup> Paragraphs 30 of Plaintiffs' First Amended Complaint relating to Plaintiffs'  
24 second cause of action and paragraph 38 relating to Plaintiffs' third cause of action assert  
25 that "[t]he failure to give notice on or before the effective date of an increase in the  
26 annual percentage rate ("APR") is also a violation of federal law, and the contract  
27 provisions which purport to authorize such a rate increase and the procedures of MBNA  
28 are violative of federal law."

Plaintiffs' fourth cause of action contains no reference to the failure to give notice  
or federal law.

1 claim upon which relief can be granted.<sup>4</sup> Plaintiffs admit that the MBNA  
2 Cardmember Agreements plainly disclose to borrowers the alleged actions which  
3 MBNA is authorized to take upon default, the very omission of such information  
4 which Plaintiffs allege is fraudulent. Thus, the Court **GRANTS** MBNA's motion  
5 to dismiss Plaintiffs' fifth cause of action.

6 Lastly, Plaintiffs' eighth cause of action alleging violations of the California  
7 Legal Remedies Act ("CLRA") §§ 1770(a)(5) and (a)(19)<sup>5</sup> is precluded because  
8 the term "consumer" as defined in the CLRA does not include individuals who  
9 obtained credit.

10 As originally drafted, CLRA included individuals who obtained credit in its  
11 definition of "consumer." The Legislature later deleted persons who obtained  
12 credit from the definition of "consumer" before passage of the statute. "The  
13 rejection by the Legislature of a specific provision contained in an act as originally  
14 introduced is most persuasive to the conclusion that the act should not be  
15 construed to include the omitted provision." Rich v. State Bd. of Optometry, 235  
16 Cal.App.2d 591, 607 (Cal. Dist. Ct. App. 1965); see also Wilson v. City of Laguna  
17 Beach, 6 Cal.App.4th 543, 555 (Cal. Ct. App. 1992). California courts have  
18 expressly held that credit relationships fall outside the scope of CLRA. See Civil  
19 Serv. Employees Ins. Co. v. Super. Ct. of San Fransico, 22 Cal.3d 362, 376 (Cal.  
20 1978) (holding "the CLRA does not apply to credit transactions," after reviewing

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21  
22 <sup>4</sup> The Delaware Consumer Fraud Act states, the "act, use or employment by any  
23 person of any deception, fraud, false pretense, false promise, misrepresentation, or the  
24 concealment, suppression, or omission of any material fact with intent that others rely  
25 upon such concealment, suppression or omission, in connection with the sale, lease or  
26 advertisement of any merchandise, whether or not any person had in fact been misled,  
deceived or damaged thereby, is an unlawful practice." Del. Code. Ann. tit. 6, § 2513(a)  
(2005).

27 <sup>5</sup> Cal. Civ. Code § 1770 prohibits the "sale or lease of goods or services to any  
28 consumer."

1 the legislative history); Utility Consumers' Action Network v. Capital One  
2 Services, Inc., JCC No. 4191 (San Francisco Super. Ct. Aug. 7, 2003).

3 Plaintiffs' reliance on an interpretation of California Civil Code § 1671 is  
4 inapposite. Plaintiffs argue that § 1770 et seq. should be read to include  
5 individuals who obtained credit within the definition of the term "consumer"  
6 because a case interpreting California Civil Code § 1671, concerning the validity  
7 of liquidated damages provisions in contracts, held that a credit card agreement  
8 includes convenience services in addition to the extension of credit. Plaintiffs rely  
9 on Hitz v. First Interstate Bank, 38 Cal.App.4th 274 (Cal. Ct. App. 1995), in which  
10 the court held, "[w]e need not decide whether an extension of credit is a consumer  
11 contract within in the meaning of Civil Code § 1671, subdivision (c)(1), because a  
12 credit card agreement is much more than that, encompassing convenience services  
13 in addition to extension of credit." Id. at 286-87. Plaintiffs' reliance on Hitz is  
14 misguided. First, the court in Hitz was interpreting § 1671 not the CLRA.  
15 Second, the holding in Hitz concerned the definition of a consumer contract and  
16 whether the convenience features of a credit card fall within that definition, not the  
17 definition of "consumer" as is the issue here. And third, there was no indication in  
18 the legislative history of § 1671 that particular language was ever affirmatively  
19 considered and later deleted from the statute as is the case here. Instead,  
20 Defendant in Hitz was attempting to make an analogy between the legislative  
21 history of the CLRA and § 1671, as Plaintiffs are apparently trying to do here,  
22 which analogy the court in Hitz did not consider. Id. Thus, the eighth cause of  
23 action fails to state a claim upon which relief can be granted.

24 Therefore, the Court **GRANTS** MBNA's motion to dismiss Plaintiffs'  
25 fourth, fifth, and eighth causes of action and **DENIES** the motion with respect to  
26 the second and third causes of action inasmuch as they rely on alleged violations  
27 of federal law. The Court grants Plaintiffs leave to amend the fourth cause of  
28 action to allege a violation of federal law if they so desire. Leave to amend the

1 fifth and eighth causes of action is denied because the Court does not believe that  
2 Plaintiffs can overcome the deficiencies in these claims nor could Plaintiffs  
3 express in the hearing in what way they would do so.

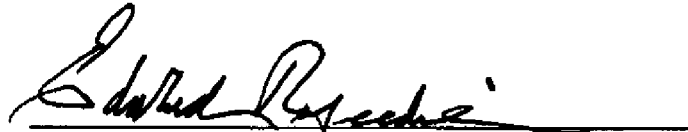
4 Because the Court grants MBNA's motion as to the state law claims on  
5 other grounds, it does not need to reach the question of whether federal law  
6 preempts the state law claims.

7  
8  
9 IT IS SO ORDERED.

10 IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United  
11 States mail or by telefax or by email, copies of this Order on counsel in this matter.

12 Dated:

13 FEB 17 2006

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15 EDWARD RAPEEDIE  
16 Senior United States District Judge  
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